IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:13/09/2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE N. KANNADASAN

C.M.P.NO.14141 OF 2001
AND
LPA.No.18 OF 2005

K. Shankar
S/o.M. Kannappa Naicker
No.4, Hospital Road,
Kancheepuram 2. .. Petitioner

-Vs-

1. The Oriental Insurance Company Ltd.,
Rep. by its Divisional Manager,
Vallal Pachaiyappan Street,
Kancheepuram.

2. P. Mohan
S/o. Desaveli Mudaliar
7/, Mahendra Pallavan Street,
Mamalla Nagar,
Kancheepuram.

3. N. Palani,
S/o. Narayanasamy,
No.2/9, Kumaresan Street,
Meenambakkam,
Chennai 600 027. .. Respondents

Appeal filed under Clause 15 of the Letters Patent against the
order of the learned single Judge dated 12.2.1999 made in CMA.No.926 of 19
91.

!For Appellant : Mr.M. Sriram

^For Respondent-1: Mr.K.S. Narasimhan

Respondent-2 : Mr.A.V. Munusamy
- - -

:J U D G M E N T

P.K. MISRA, J

The question in controversy relates to the extent of liability of the Insurance Company. Appeal has been preferred by the owner. There is a delay of about 900 days in filing the appeal. Notice has been served on the respondent/Insurance Company as well as the claimant/ respondent.

2. At the time when the petition for condonation of delay was listed, we had made it clear to the counsels appearing for all the parties that they should advance arguments not only on the question of delay but also on merit of the appeal itself. Accordingly, the learned counsels have been heard on the question of condonation of delay as well as on merit of the appeal. It is therefore necessary to first consider the question of

condonation of delay and, if delay is condoned, the appeal itself would be disposed of on merits. However, if the delay is not condoned, it may not be necessary to deal with the questions raised in the appeal.

3. In the petition for condonation of delay, the appellant has contended that since he had shifted his business to Dharmapuri from Kancheepuram in the year 1988, he had lost contact with his advocate and the letter sent to him by his advocate could not be received by him, and, therefore, he was not aware of the disposal of the appeal by the learned single Judge of the High Court. It has been further stated that when he had come to Kancheepuram in connection with a marriage, he was informed by his relatives regarding filing of an execution case and, thereafter, the appellant contacted his advocate at Chennai and after tracing out the connected files, the appeal was filed without any further delay. It has been stated by him that delay is neither wilful nor wanton but due to circumstances beyond his control.

4. A counter affidavit has been filed on behalf of Respondent No.2. In such counter affidavit, the allegation that the appellant had shifted his residence and business activities to Dharmapuri had been denied. On the other hand

it is claimed that still the appellant is continuing his business in Kancheepuram and staying there.

5. A counter affidavit is also filed on behalf of Respondent No.1, namely, the Insurance Company, similarly denying the allegations made by the appellant.

6. Even though the delay in filing the appeal is considerable, it cannot be held that the appellant had deliberately delayed the matter, as ordinarily he is not expected to derive any benefit by simply delaying such filing of the appeal. It is now well settled that the question of delay should be considered liberally with a view to advance the cause of substantial justice. In this connection, it is worthwhile to refer to the observations made in AIR 1987 SC 1353 (COLLECTOR, LAND ACQUISITION, ANANTNAG

ANDANOTHER v. MST. KATIJI AND OTHERS) :-
"... It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that :-
1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay ? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

7. Having regard to all these aspects, we are inclined to condone the delay notwithstanding the serious objections raised by the counsels appearing for the respondents, more particularly the counsel appearing for the first respondent Insurance Company. However, it is made clear that in case the delay in filing of the appeal is condoned and the judgment of the learned single Judge would be modified, the Insurance Company shall not be made liable to pay interest for the relevant period, i.e., from the date of the judgment of the learned single Judge till the disposal of the appeal and the interest for such period has to be paid by the appellant to the claimant /second respondent.

8. For the aforesaid reasons and subject to the aforesaid observation, the delay is condoned.

9. As already indicated, we had heard the appeal on merit while considering the question of condonation of delay. The only question raised in the appeal relates to the extent of liability of the Insurance Company. To appreciate the question, it is only necessary to notice the relevant facts in brief.

10. The claim application, namely, MCOP.No.56 of 1990 was

filed by the present second respondent claiming compensation on account of grievous injuries sustained by him in an accident which occurred on 19.9 .1989. The Insurance Company in its counter had indicated that the vehicle involved in the accident is a public carrier lorry and even though the accident occurred after the Motor Vehicles Act, 1988 came into force with effect from 1st July, 1989, the policy was taken under the old Act and period of four months had not elapsed since July, 198 9 at the time of accident, and therefore, the liability of the Insurer was restricted to Rs.1,50,000/-. The Claims Tribunal by its award dated 16.4.1991, awarded a sum of Rs.4,75,000/- with interest at the rate of 12%, but directed that the entire amount should be paid by the Insurance Company.

11. C.M.A.No.926 of 1991 was filed by the Insurance Company against such award. Even though a cross-objection was filed by the claimant / respondent in such appeal, such cross objection was not pressed and only the question of extent of liability of the Insurance Company was decided by the learned single Judge under the impugned judgment.

12. Learned single Judge held that since the liability of the Insurance Company was limited to Rs.1,50,000/- under Section 95(2)(b)(i) of the Motor Vehicles Act, 1939 and the policy had been taken under such old Act and such policy continued to be effective for a period of four months after the commencement of the new Act, the liability of the Insurance Company was limited to Rs.1,50,000/-. Accordingly, while allowing the appeal of the Insurance Company, confining the liability of the Insurance Company to Rs.1,50,000/-, directed that balance amount should be paid by the owner, the present appellant.

13. Section 95 of the Motor Vehicles Act, 1939 lay down the requirements of policies and limits of liability. Section 95(2), being relevant, is extracted hereunder :-

95(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely-

(a) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmens Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees other than the driver, not exceeding six in number, being carried in the vehicle;

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;

(c) save as provided in clause (d), where the vehicle is a vehicle of any other class,the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees six thousand in all in respect of damage to any property of a third party.

14. The relevant portion of Section 147 of the Motor Vehicles Act, 1988 is to the following effect :-

147. Requirements of policies and limits of liability.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-
...
(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-
...
(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:-
(a) save as provided in clause (b), the amount of liability incurred;
(b) in respect of damage to any property of a third party, a limit of rupees six thousand:
Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.
(3) ...
(4) ...
(5) ... (Other provisions omitted)

15. A comparison of the aforesaid provisions makes it clear that there has been an important change under the new Act inasmuch as the liability has become unlimited under Section 147, whereas under the old Act the liability in respect of certain type of vehicles was limited.

16. Learned single Judge has held that since the policy had been issued at a time when the Motor Vehicles Act, 1939 was in force and such policy continued to remain in force for a period of four months, by virtue of proviso to Section 147(2), the insurer is liable to pay a sum of Rs.1,50,000/- as envisaged under the old Act.

17. Learned counsel for the appellant has contended that since the accident occurred on 19.9.1989, after the Tamil Nadu Motor Vehicles Act, 1988 came into force with effect from 1.7.1989, the liability of the Insurance Company is unlimited as contemplated under Section 147(2). Learned counsel has placed reliance upon the decision of the Supreme Court reported in II(2000)ACC 463 (SC) (NATIONAL INSURANCE COMPANY LTD. v. BEHARI LAL & OTHERS). In the said case, the policy of insurance was issued under the Motor Vehicles Act, 1939 on 28.10.1988 and was valid till 27.10.1989. The accident which occurred after 1.7.1 989 resulted in death of one passenger. The Insurance Company had contended that the liability under the terms of the policy issued under the old Act was limited to Rs.15,000/- per passenger. Such contention was accepted by the Tribunal. However, the High Court held that the liability of the Insurance Company is co-extensive with that of the owner and accordingly directed the Insurance Company to pay the entire amount. On appeal, the Supreme Court observed :-
8. Now, a policy of insurance may be a contract policy or a statutory policy. The proviso does not deal with unlimited liability which an insurer may undertake under a contract policy. It deals with a statutory policy with limited liability. The question, which, arises here is: what is

the import of the phrase, "with any limited liability and in force"? To understand the meaning of this phrase, it becomes necessary to refer to Section 95 of the Old Act which deals with requirements of policies and limits of liability. Under Sub-section (2) of Section 95 a policy of insurance (a statutory policy) was required to cover any liability incurred in respect of any one accident, in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment: (1) in respect of persons other than passengers carried for hire or reward, a limit of one lakh and fifty thousand rupees in all; and (2) in respect of passengers a limit of fifteen thousand rupees for each individual passenger. Therefore, the phrase means a statutory policy under the Old Act with the limit prescribed therein which was valid immediately before the commencement of the New Act. The words are not employed to limit the liability of an Insurance Company to the amount specified in the policy by virtue of the provisions of Section 95(2) of the Old Act either for a period of four months or for a lesser period during which the policy is valid. It is argued by Mr.Sharma that by the proviso the liability of the Insurance Company is limited to the amount mentioned in the existing statutory policy issued under the Old Act. We are afraid, we cannot accede to this contention and he can derive no benefit by relying on the following observation of this Court in New India Assurance Company v. Satpal Singh & Ors., 2000(1) SCC 237=I (2000) ACC 573 (SC):

"The Legislature has also taken care of even the policies which were in force on the date of commencement of the Act by specifically providing that any policy of insurance containing any limit regarding the insurer's liability shall continue to be effective for a period of four months from commencement of the Act or till the date of expiry of such policy, whichever is earlier. This means, after the said period of four months, a new insurance policy consistent with the New Act is required to be obtained."

9. There the question before this Court was with regard to liability of the Insurance Company in case of death of a gratuitous passenger in the truck which met with an accident resulting in his death. We cannot read the observation, quoted above, as laying down the law that the amount specified in the policy in force on the date of the commencement of the New Act will be payable for a period of four months after such commencement or till the date of expiry of such policy, whichever is earlier.

10. In our view, the proviso cannot be so interpreted as to subject the Insurance Companies to different maximum liabilities under statutory policies in respect of accidents occurring during the same period. We do not think that this could be the intention of the Parliament. Having fixed a date for enforcement of the New Act incorporating the requirement of a statutory policy under Section 147(1) thereof, the effect of the provision could not have been whittled down during the period which may vary from one day to four months depending upon when the existing policy expires within the said period of four months. It merely indicates the span of validity of existing policy. Here, it is pertinent to notice the provisions of Section 217(2) of the New Act which deal with the effect of repeal of the Old Act (under which a statutory policy was taken) on coming into force of the New Act. Sub-section (1) of Section 217 repeals,inter alia, the Old Act. Clause (c) of Sub-section (2), which is relevant, provides that notwithstanding the repeal under

Sub-section (1) of the Old Act any document, referring to any of the repealed enactments or the provisions thereof, shall be construed as referring to the New Act or the corresponding provisions thereof.

18. Learned counsel appearing for the appellant has also placed reliance upon the Division Bench decision of Punjab & Haryana High Court reported in II (1997) ACC 309 (DB) (NATIONAL INSURANCE COMPANY LIMITED v. PUJA RIOLLER FLOUR MILLS (PVT.) LTD. & FIVE OTHERS). The Division Bench by relying upon the provisions contained in Section 217(2)(c) has held that the Insurance Company is liable to pay compensation as envisaged under the new Motor Vehicles Act, 1988. It was observed by the Division Bench as follows:-

7. Thus the Insurance Company has undertaken to reimburse the amount of the loss of the owner of the vehicle to the extent of the liability imposed by the statute. Admittedly, the accident in this case took place on 29.9.1989 and the amending Act came into force on July 1, 1989. The contract of insurance does not provide any specific limited liability. Therefore, there is no limit of contractual liability under the terms of the policy. The policy issued clearly specifies that the Insurance Company is liable to pay such amount as is payable under the statute. The Motor Vehicles Act 1988, as already stated, came into force on 1st July, 1989 i.e. before the accident, in this case, took place. Under Clause 2(c) of Section 217 any document referring to any of the repealed enactment or the provisions thereof shall be construed as referring to 1988 Act or to the corresponding provisions of 1988 Act. Therefore, a legal fiction created under Section 21 7(2)(c) is that the provisions of 1988 Act are to be read as the corresponding provisions of the Motor Vehicles Act, 1939 which were referred to in the policy of insurance. In other words, the reference to the requirement of the Motor Vehicles Act, 1939 are to be taken as referring to the 1988 Act. Therefore, any reference made to the provisions of 1939 Act is to be read as provisions of the new Act. If so read, the liability of the Insurance Company will be under the provisions of the new Act. As the policy of the insurance stipulates that the liability of the Insurance Company is the same as fixed by the statute on the date of the accident, the provisions of the New Act have come into force, therefore, the provisions of the New Act have to be read into the policies which are in force at the time when 1988 Act came into force. When the policy itself refers to the statutory liability, it means the liability as fixed by the provisions of the new Motor Vehicles Act, 1988. If the contract of insurance itself fixes the liability i.e. the contractual liability, the same will be in force for a period of four months after the commencement of the 1988 Act according to proviso to Sub-section (2) of Section 147 of the Act. But in this case, admittedly, the contract of insurance does not provide any contractual liability nor does it say that the liability of the Insurance Company is limited to a particular amount. The contract of policy speaks of statutory liability and when there is change of law on the date of accident, the provisions of the changed law will apply.

19. As a matter of fact, the aforesaid decision of the Punjab & Haryana High Court was specifically approved by the Supreme Court in II (2000) ACC 463 (cited above).

20. In 1982 A.C.J. 191 (PADMA SRINIVASAN v. PREMIER

INSURANCE COMPANY LTD.), the accident was caused by the truck driver on 5.4.1970 causing the death of the scooterist. The policy in question was issued on 30.6.1969, at a time when as per Section 95(2)(a) of the Motor Vehicles Act, 1939 the limit of liability was Rs.20,000/-. However, such provision was amended as per Act 56 of 1969 with effect from 2.3.19 70 and the limit of liability was increased to Rs.50,000/-. The Tribunal considering the fact that on the date of accident the limit of liability was Rs.50,000/-, even though when the policy was issued such statutory liability was only Rs.20,000/-, directed that out of a sum of Rs.60,000/- payable as compensation, the Insurance Company is liable to pay Rs.50,000/-. However, the Insurance Company filed an appeal, which was allowed by the High Court on the footing that the limit of liability of the Insurance Company was Rs.20,000/- at the time when the Insurance Policy had been issued. The appeal filed by the claimant before the Supreme Court was allowed by observing that the material date for ascertaining the extent of liability of the Insurer is the date of the accrual of the cause of action for a claim arising out of an accident and, therefore, the Insurance Company liability arising out of an accident, which happens after March 2, 1970, has to be determined on the basis of the amended provisions of section 95(2)(a) of the Act, even though the policy of insurance may have been issued prior to the date of the amendment, that is, prior to March 2, 1970 .

21. The aforesaid decision of the Supreme Court was followed by Orissa High Court in 2001 A.C.J. 458 (NEW INDIA ASSURANCE CO. LTD. v. K. SAIMMA AND OTHERS), a case arising under the Motor Vehicles Act, 19 88, almost on similar facts as in the present case.

22. It is of course true that there are some decisions of some High Courts decisions, including the decision of Patna High Court reported in 2000 ACJ 163 (NATIONAL INSURANCE CO. LTD. v. SHOBHA DEVI AND OTHERS) and the Andhra Pradesh High Court reported in 2001 ACJ 1902 (NEW INDIA ASSURANCE CO. LTD. v. KANCHERLA SURYAVATHI AND OTHERS), wherein the learned single Judges have simply referring to Section 147(2)(a) proviso have upheld the contention to the effect that the extent of liability was limited to the amount specified in Section 95(2) of the Motor Vehicles Act, 1939 in view of the language of the proviso to Section 147(2). However, there is no reference in any such decisions to the observations made in 1982 A.C.J. 191 (cited supra). At any rate, in view of the subsequent decision in II (2000) ACC 463 (SC) (NATIONAL INSURANCE COMPANY LTD v. BEHARI LAL & OTHERS), it cannot be said that the views of the Patna High Court and Andhra Pradesh High Court represent the correct law.

23. As against the aforesaid decisions, the learned counsel appearing for the Insurance Company has submitted that as per the plain language contained in Section 147(2) proviso, the policy issued under the old Act with limited liability continue for a period of four months from the date of commencement of the new Act or till the expiry of the old policy whichever is earlier, and, therefore, the liability must be taken to be limited. He has placed reliance upon the decision of the Orissa High Court reported in 2004 ACJ 1893 (DIVISIONAL MANAGER, UNITED INDIA INSURANCE CO. LTD. v. GOKULA

MOHARANA AND ANOTHER). A careful reading of the aforesaid decision makes it clear that the Division Bench of Orissa High Court has raised certain questions regarding compatibility of the decision of the Supreme Court in National Insurance Company Ltd. v. Behari Lal & Others (cited above) with the subsequent Constitution Bench decision of the Supreme Court in 2002 AIR SCW 259 (NEW INDIA ASSURANCE CO. LTD. v. C.M. JAYA AND OTHERS). Ultimately, the Division Bench desisted from giving any definite answer on the point. Therefore, it cannot be said that the Division Bench decision of the Orissa High Court has purported to take a view contrary to that of the Supreme Court in Behari Lal□s case.

24. It is now necessary to examine whether the decision of the Supreme Court in Behari Lal□s case can be said to have been modified in any manner in the Constitution Bench decision of the Supreme Court reported in 2002 AIR SCW 259 (cited above). The question which was referred to the Constitution Bench for consideration was whether in a case of insurance policy not taking any higher liability by accepting a higher premium, in case of payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95(2) or the insurer would be liable to pay the e ntire amount and he ultimately recover from the insured. The dispute was in the context of policy which was described as comprehensive. The Supreme Court had observed :-

□5. Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. This view has been consistently taken in the other decisions of this Court.
...

7. ... The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to re-writing the statute or the contract of insurance which is not permissible.
...
11. In the premise, we hold that the view expressed by the Bench of three learned Judges in the case of Shanti Bai is correct and answer the question set out in the order of reference in the beginning as under :-

In the case of insurance company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the

insurer would be liable to the extent limited under Section 9 5(2) of the Act and would not be liable to pay the entire amount.

25. On a careful reading of the decision of the Supreme Court, we do not think that there is any observation made by the Constitution Bench which can be construed as impliedly overruling the decision in Beharilal's case.

26. Learned counsel for the respondents has also referred to certain observations made in 2000 ACJ 1 (NEW INDIA ASSURANCE CO. LTD. v. SATPAL SINGH AND OTHERS), :

... Hence, under sub-section (2) there is no upper limitation for the insurer regarding the amount of compensation awarded in respect of death or bodily injury of a victim of the accident. It is, therefore, apparent that the limit contained in the old Act has been removed and the policy should insure the liability incurred and cover injury to any person including owner of the goods or his authorised representative carried in the vehicle. The legislature has also taken care of even the policies which were in force on the date of commencement of the Act by specifically providing that any policy of insurance containing any limit regarding insurer's liability shall continue to be effective for a period of four months from commencement of the Act or till the date of expiry of such policy, whichever is earlier. This means, after the said period of four months a new insurance policy consistent with the new Act is required to be obtained.

27. In the said decision, the accident had taken place on 11.3.1990 and not within the period of four months from 1.7.1989. The scope of Section 147(2) proviso was not at all in question.

28. Apart from the fact that such decision has been subsequently overruled in 2002(9) SCALE 172 (NEW INDIA ASSURANCE CO. LTD. v. ASHA RANI & OTHERS), in our opinion, there is nothing categorical in the said decision which lays down that the liability of the Insurance Company in respect of an accident occurred after 1.7.1989 would be confined to a particular sum. As a matter of fact, it may be emphasised here that such decision of the Supreme Court was in fact referred to and distinguished by the subsequent Supreme Court's decision in II (2000) ACC 463 (cited above).

29. In the absence of any other contrary decisions, we are bound to follow the observations made in II(2000) ACC 463.

30. In such view of the matter, the decision of the learned single Judge cannot be sustained and it must be held that the liability of the Insurance Company is to pay the entire award amount and not the sum of Rs.1,50,000/-, as observed by the learned single Judge. The appeal is therefore allowed and it is directed that the Insurance Company is liable to pay the entire award amount of Rs.4,75,000/-.

31. In the earlier part of the judgment, while condoning the delay in filing the appeal, we had observed that it would be unjust to call upon the Insurance Company to pay interest for the period of delay.

32. Having regard to all these aspects, even though we are setting aside the order of the learned single Judge, we direct that so far as the interest on the differential amount is concerned, the owner would be liable to pay such interest from the date of judgment of the learned single Judge till the date of jugment in the present appeal and the Insurance Company would be liable to pay interest on such differential amount hereafter and for the period prior to the date of judgment of the learned single Judge.

33. Subject to the above directions, the appeal is allowed. There would be no order as to costs.

Index : Yes
Internet: Yes
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